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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 603

FIRST IOWA HYDRO-ELECTRIC COOPERATIVE, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent.*
STATE OF IOWA, *Intervenor.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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November, 1945.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

First Iowa Hydro-Electric Cooperative, Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered on August 13, 1945, which affirmed an order of the Federal Power Commission denying a license to Petitioner for the construction and operation of a hydro-electric project upon the Cedar River in the State of Iowa.

OPINIONS BELOW.

The opinion of the Court of Appeals for the District of Columbia (R. 54-72) is reported in 151 F. (2d) 20. The

opinion of the Federal Power Commission is found at R. 11-17.

JURISDICTION.

The judgment of the Court of Appeals for the District of Columbia was entered on August 13, 1945. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 313(b) of the Federal Power Act.

STATUTE INVOLVED.

The pertinent provisions of the Federal Power Act (June 10, 1920, c. 285, 41 Stat. 1063, amended August 26, 1935, c. 687, 49 Stat. 838, 16 U. S. C. 791a) are set forth in the Appendix, *infra*.

QUESTIONS PRESENTED.

Upon consideration of an application filed on August 11, 1941, by Petitioner for a license under Part I of the Federal Power Act to authorize the construction and operation of a power development on the Cedar River in Cedar and Muscatine Counties in the State of Iowa, and extending to the Mississippi River north of Muscatine, Iowa, the Federal Power Commission found that Petitioner had not submitted satisfactory evidence of compliance with laws of the State of Iowa, as required by Section 9(b)[1] of the Federal Power Act, in that Petitioner had not obtained a permit from the State Executive Council authorizing the project. The questions presented are:

1. Whether a state permit is required for the construction of the proposed power project on the Cedar River in the State of Iowa, as provided in Chapter 363 of the Iowa Code of 1939, when, upon a declaration of intention filed pursuant to Section 23(b) of the Federal Power Act to construct the very project here in question, the Federal

[1] Appendix, p. 24.

Power Commission in its Finding of June 3, 1941,[2] (a final determination from which no appeal was taken) found that the Cedar River, and the Iowa River into which the Cedar flows, are navigable waters of the United States; that the interests of interstate commerce would be affected by the construction of the proposed project; that lands of the United States would be flooded and occupied; and that "A license for the construction proposed * * * is required under the provisions of the Federal Power Act."

2. Whether the Federal Power Commission erred in dismising Petitioner's application for a federal license upon the finding that Petitioner "has not presented satisfactory evidence, pursuant to Section 9(b) of the Federal Power Act, of compliance with the requirements of *applicable* law of the State of Iowa requiring a permit from the State Executive Council to effect the purposes of a license under the Federal Power Act, * * *."[3] (Italics supplied)

3. Whether the Court below was in error in holding that Chapter 363 of the Iowa Code of 1939 has valid application in so far as navigable waters of the United States, within the State of Iowa, are concerned.

4. Whether the Court below was in error in holding that Congress in enacting Part I of the Federal Power Act did not completely occupy the field of regulation with respect to the construction, operation and maintenance of hydroelectric projects upon navigable waters of the United States.

5. Whether the Court below erred in holding that "The Commission, properly, insisted upon a good faith effort, by its applicant, [Petitioner herein] to comply with the State law", and in failing to give effect to the opinion of the Attorney General of Iowa that the State Executive

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[2] Appendix, pp. 19-22 (2 F. P. C. 958).

[3] R. 13. (The word "applicable" does not appear in Section 9(b)).

Council could not legally issue a permit to petitioner for the project involved (R. 49).

6. Whether, with respect to navigable waters of the United States within the State of Iowa, Chapter 363 of the Iowa Code of 1939 was superseded by the Federal Water Power Act of 1920, as amended, which became Part I of the Federal Power Act of 1935 by Title II of the Public Utility Act of 1935 (49 Stat. 838).

7. Whether the Court below erred in holding that, with respect to the construction of power projects upon navigable waters of the United States requiring a federal license under Part I of the Federal Power Act, Section 9(b) of the Act, like Section 27, effectively *saved* certain State laws which otherwise would have been superseded.

8. Whether the Court below erred in holding that Section 9(b) of the Federal Power Act, "expresses the major intention of Congress that the States and the National Government shall participate jointly in the development and regulation of water power projects", in view of the express provisions of Section 23(b) and the findings of the Federal Power Commission that a license, in accordance with the provisions of the Federal Power Act, was required for Petitioner's project.[4]

9. Whether the Court below erred in holding that, with respect to the proposed project upon the Cedar River in the State of Iowa, a navigable river of the United States, Petitioner's failure to comply with Section 7796 of the Iowa Code of 1939 which provides that whenever the erection of a dam affects highways, the applicant for a State permit to construct such dam, "shall as a condition precedent secure a permit from the board, commission, or other official body charged with jurisdiction over and control of said highways * * * ", constituted a failure to comply with Section 9(b) of the Federal Power Act and "For this

[4] The Commission's findings are contained in its Order of June 3, 1941. Appendix, pp. 21-22 (2 F. P. C. 958).

reason alone, therefore, the Commission's order must stand." (R. 68)

10. Whether the Court below erred in holding "that the area of law covered" by Sections 7767 and 7771 of the Iowa Code of 1939, is "so obviously within the domain of the State's power that Congressional intention, to supersede the disputed state laws, must much more clearly appear than it does in the Power Act." (R. 69)

11. Whether the Court erred in holding that Chapter 363 of the Iowa Code of 1939 did not "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" as announced in Part I of the Federal Power Act. (R. 72)

12. Whether Sections 7767, 7771 and 7796 of Chapter 363 of the Iowa Code can be separated from context and given effect as separate provisions of law, in disregard of the fact that such sections are but coordinate parts of Chapter 363.

STATEMENT.

The Petitioner.

First Iowa Hydro-Electric Cooperative, the Petitioner, is a non-profit cooperative association, organized under the laws of the State of Iowa and having its office and principal place of business in Muscatine, Iowa.

The Statute.

Under Section 4(e) of the Federal Power Act [16 U. S. C. 797(e)], the Commission is authorized to issue licenses to citizens of the United States or to any corporation organized under the laws of the United States, or of a state thereof, or to any State or municipality, for the purpose of constructing, operating and maintaining dams or other project works necessary or convenient for the development and improvement of navigation and for the development,

transmission and utilization of power derived from any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states.

Section 23(b) of the Act[5] makes it unlawful to construct, operate or maintain any dam, power house or other work incidental thereto across, along or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States, except under and in accordance with a permit granted prior to June 10, 1920 or a license granted pursuant to the Federal Power Act.

The section further provides that any person intending to construct a dam or other project works across, along or in any stream *other than those defined as navigable waters of the United States* and over which Congress has jurisdiction under its authority to regulate commerce, shall before such construction file a declaration of such intention with the Federal Power Commission. Whereupon the Commission is required to cause immediate investigation of such proposed construction to be made and *if it shall find* that the interests of interstate or foreign commerce would be affected by such proposed construction such person shall not construct, maintain or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of the Federal Power Act. *If the Commission shall not so find*, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws.

Section 9(b) provides that each applicant for a license under the Act shall submit to the Commission "Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage

[5] Appendix, pp. 24-25.

in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act."

The Proceeding Before the Commission.

On January 29, 1940, Petitioner, as required by Section 23(b) of the Federal Power Act [16 U. S. C. 817], filed a declaration of intention with the Federal Power Commission for a run-of-river hydroelectric development to be located on the Cedar River, in Cedar and Muscatine Counties, Iowa. Thereafter on April 2, 1941, the original declaration of intention was supplemented to extend the power development, by means of a diversion canal, to the Mississippi River north of Muscatine, Iowa. On June 3, 1941, the Federal Power Commission found that the Cedar River, as well as the Iowa River into which the Cedar River flows, are navigable waters of the United States; that the interests of interstate commerce would be affected by the proposed construction; that public lands of the United States would be flooded and occupied; and that "A license for the construction proposed * * * is required under the provisions of the Federal Power Act."[6]

Thereafter, on August 11, 1941, Petitioner filed an application with the Federal Power Commission for a license under Section 4(e) [16 U. S. C. 797(e)] authorizing the construction, operation and maintenance of the proposed power development.

The State of Iowa was permitted to intervene and, after extended hearings, the Commission on January 29, 1944, dismissed Petitioner's application for a license upon the finding that:

> "The applicant has not presented satisfactory evidence, pursuant to Section 9(b) of the Federal Power Act, of compliance with the requirements of applicable laws of the State of Iowa requiring a permit from the

[6] The June 3, 1941, finding of the Federal Power Commission is set forth in the Appendix, *infra*, pp. 19-22 (2 F. P. C. 958).

State Executive Council to effect the purposes of a license under the Federal Power Act, and the pending application, as supplemented, should be dismissed without prejudice." (R. 18)

On February 29, 1944, Petitioner filed an application for rehearing pursuant to Section 313(a) of the Federal Power Act [16 U. S. C. 825L(b)]. Thereafter, on March 7, 1944, the Commission entered an order denying the application for rehearing with the following finding:

"The Commission *finds* that:

"No useful purpose would be served by granting the petition for rehearing and that reconsideration of the order of January 29, 1944, dismissing the application for license would not be appropriate." (R. 27)

The Opinion Below.

On review, the Court below affirmed the Commission's order upon the ground, among others, that Petitioner had not complied with the provisions of Section 9(b) of the Federal Power Act [16 U. S. C. 802(b)], by reason of its failure to obtain a permit from the Executive Council of the State of Iowa authorizing the construction, operation and maintenance of the hydroelectric development in question as provided by Chapter 363 of the Iowa Code; and that Petitioner had otherwise failed to comply with Sections 7767, 7771 and 7796 of Chapter 363 of the Iowa Code.

REASONS FOR GRANTING THE WRIT.

This case is one of vital public significance. The dominant issue underlying the questions presented is whether Section 9(b) of the Federal Power Act, is to be so construed that the State of Iowa, and all other states and territories of the United States, may by statute require a state or territorial permit or license for the construction of a power project, upon navigable waters of the United States, as a condition precedent to the issuance of a federal license un-

der Part I of the Federal Power Act. Chapter 363 of the Iowa Code of 1939 is here involved and if Section 9(b) of the Federal Power Act is to be given the meaning and effect which the Federal Power Commission and the Court below gave to it, then the state may interpose varied conditions, limited only by inclination, to nullify the licensing provisions of the Federal Power Act.

The true meaning and correct application of Section 9(b) of the Federal Power Act are matters of great public moment which only this Court can finally resolve, and which in the public interest should be resolved beyond question or doubt. Moreover, the decision of the Court below, on several of the basic questions presented, appears to be in conflict with decisions of this Court.

1. Section 23(b) of the Federal Power Act clearly delineates the spheres within which state and federal authorities may rightfully operate in the regulation of proposed power projects on flowing streams within the borders of a state. By that section a federal license is required where the proposed project is upon navigable waters of the United States. Likewise a federal license is required by Section 23(b) before the construction of a power project is undertaken across, along, over or in any stream, not a navigable water of the United States, *whenever the Commission finds that interstate or foreign commerce will be affected by the proposed construction.* When, and only when, the Commission finds that interstate and foreign commerce *will not be affected* by such proposed construction may the project be constructed "upon compliance with State laws."

The Cedar River is a navigable water of the United States. A federal license is required and the Federal Power Commission so found in its order of June 3, 1941. Yet the Federal Power Commission and the Court below find justification for a State permit or license as a prerequisite to the issuance of a federal license. This holding is based on the provisions of Section 9(b) of the Act. The Commission provided no logical *rationale* for its decision.

The Court below interpreted Section 9(b) to mean that Congress provided for (1) *joint* State and federal control over hydro-electric projects upon navigable waters of the United States, (2) a limitation upon federal authority which effectively "saved" certain state laws which otherwise would have been superseded, (3) State regulation within an "area of law" so obvious that Congressional intent to enter that field could not be justified without a much more clear pronouncement, and (4) recognition of an Iowa law which did not stand as an "obstacle" to the accomplishment and execution of the full purposes and objectives of Congress as announced in Part I of the Federal Power Act. The Court also held that Petitioner's failure to seek a State permit under Chapter 363 of the Iowa Code violated the rule of judicial administration which requires that administrative remedies be exhausted before judicial review will lie.

2. Chapter 363 of the Iowa Code is a comprehensive enactment of general application concerning the development and regulation of water power.[7] The chapter must be construed as a whole. Individual sections do not stand alone. *Helvering* v. *New York Trust Co.*, 292 U. S. 455; *Hellmich* v. *Hellman*, 276 U. S. 233; *Helvering* v. *Credit Alliance Corp.*, 316 U. S. 107. Both the Commission and the Court below emphasize various sections of Chapter 363, particu-

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[7] The preamble to the Code Commission Bill (Senate File 186), which, with revisions, became Chapter 363 of the Iowa Code of 1924, and of 1939, provided:

> "The general purpose of this bill is to combine and codify into one body two chapters relating to water power improvement. Both these chapters ante-date hydroelectric development, and neither one is available for projecting and utilizing water power improvements in the modern sense. Recent investigations disclose that thousands of horsepower could be made available for industrial development under proper provisions of law. While the bill prescribes, with some modifications, the ancient mill dam and race statute, the two bodies of law are combined and broadened by the proposals of the bill in an effort to promote and encourage water power development."

larly Sections 7767, 7771 and 7796. But such sections, and other sections of Chapter 363, are only important in laying down the conditions which an applicant for a *state permit* must satisfy. That is a matter of state administration. The individual sections of Chapter 363 do not stand alone. They are each a part of one act. The issuance of a state permit is the only matter of concern to the Federal Power Commission, *if Section 9(b) requires compliance with Chapter 363.*

Joint state and federal control means divided authority. It is difficult to understand what Petitioner would do with separate state and federal licenses for the same project or which one of the two licenses would prevail where contrary rules, regulations and license provisions obtained. On the other hand, it is unreasonable to assume that it was the intention of Congress, the Commission, and the Court below to require a State permit to satisfy to the letter the requirements of Section 9(b) and, having thus satisfied those requirements, to consign the State permit to the limbo of forgotten regulations. However, if a State permit cannot be had, is such failure an insurmountable obstacle to the issuance of a federal license? Petitioner finds itself in an impossible situation. As Mr. Justice McLean said, in writing the Court's decision in *The Passenger Cases*, 7 Howard 283:

> "A concurrent power in two distinct sovereignties to regulate the same thing is as impossible in principle as it is impractical in action. It involves a moral and physical impossibility."

3. If the decision of the Commission and the Court below is permitted to stand the several states and territories may effectively veto the construction of any power project upon navigable waters of the United States by legislating with respect to the construction of such projects and imposing terms and conditions as a prerequisite to construction. The construction of a proposed power project for which a federal license is required under Part I of the Federal Power Act, may thus be vetoed by State action. If Petitioner must

comply with Chapter 363 of the Iowa Code of 1939, the State Executive Council may dictate when and how the proposed project will be built and how it will be operated and maintained, notwithstanding the various provisions of Part I of the Federal Power Act relating to conditions upon which a license may be issued. Section 10 of the Federal Power Act [16 U. S. C. 803] provides that all licenses shall be conditioned upon the right of the Commission, among other things, to modify the plans for the proposed construction, to limit or reject alterations in the project works at variance with approved plans, to provide for fitting maintenance and repair of project works, and to impose other conditions not inconsistent with the provisions of Part I of the Act. Section 11 [16 U. S. C. 804] provides for the inclusion of structures for navigation in any proposed project upon navigable waters of the United States under the circumstances specified. Section 13 [16 U. S. C. 806] provides a time limit for construction. The license provisions of the Act are replete with provisions requiring administration by the Federal Power Commission.

If the State of Iowa under Chapter 363 of the Iowa Code can issue a valid permit which is to govern the construction, operation and maintenance of a power project on the Cedar River, a navigable water of the United States, and which the Federal Power Commission must recognize under Section 9(b), and other states can likewise enter the realm of regulation concerning power projects upon navigable waters of the United States within their borders, prospective development of hydroelectric projects upon navigable waters of the United States must proceed according to the divergent views of the several states as required by state statute and the administration therein provided.

4. When Congress occupies a field within its competence, state regulation is at an end. *Wilson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245; *Hines* v. *Davidowitz*, 312 U. S. 52; *California* v. *Thompson*, 313 U. S. 109, 114; *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148. The Court below, how-

ever, held that it was not the intent of Congress, in enacting the Federal Power Act, that the Federal governments should occupy the field completely, or that the states should be excluded; that on the contrary, the Act contemplates a dual system of control and the exercise of appropriate powers by the state, as well as by the Federal government.' The Court below then concludes by saying, "This is the plain purpose of Section 9(b). It is revealed, also, by other sections of the Act."[9] (R. 58)

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[8] The Court below cites the following cases in its footnote 9: United States v. Appalachian Electric Power Co., 311 U. S. 377, 428-429; Alabama Power Co. v. Federal Power Commission, 73 U. S. App. 315, 320, 128 F. (2d) 280, 285; Safe Harbor Water Power Corporation v. Federal Power Commission, 3 Cir., 124 F. (2d) 800, 806-807. These cases provide no support for the claim that Congress delegated to the States a part of its authority over navigable waters. Congress in Part I of the Federal Power Act sought to respect the rightful prerogatives of the States. It did no more. The legislative history of Section 9(b) of the Federal Water Power Act of 1920 makes that certain.

In footnote 33, the Court below refers to the *Jersey Central Power & Light Company* v. *Federal Power Commission*, 319 U. S. 61, 76, in support of the statement that the legislative history of the Federal Power Act indicated a purpose on the part of Congress to assist and strengthen State control and regulation rather than impair and diminish it. The *Jersey Central case* dealt with Parts II and III of the Federal Power Act which were enacted in 1935, more than 15 years after the enactment of Section 9(b) which was a part of the Federal Water Power Act of 1920, now Part I of the Federal Power Act. Likewise Parts II and III were involved in *Connecticut Light and Power Co.* v. *Federal Power Commission*, ——— U. S. ———, 65 S. Ct. 749 (Footnote 31 to Opinion below).

Reference to the case of *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 591, 610 (Footnote 32), by the Court below provides no support for the reasoning of the Court. That case dealt with the Natural Gas Act of 1938, (c. 56, 52 Stat. 821; 15 U. S. C. 717 *et seq.*). Its provisions deal with the same matters of regulation concerning gas as Parts II and III of the Federal Power Act provide for electric power.

[9] The Court below cites the following sections of the Federal Power Act in footnote 10: Section 4(e), 4(f), 7(a), 10(e), 14, 19, 20, 27; 16 U. S. C. A. §§ 797(e), 797(f), 800(a), 803(e), 807, 812, 813, 821. Nowhere in these sections is there the slightest indication that Congress intended or contemplated dual or divided control with respect to any subject matter.

Part I of the Federal Power Act, which is substantially the Federal Water Power Act of 1920 (41 Stat. 1063), is not to be confused with Parts II and III of the Federal Power Act which were enacted as Title II of the Public Utility Act of 1935 (49 Stat. 838). The purpose of Congress in enacting the Federal Water Power Act of 1920 was to unify control over hydroelectric power developments on navigable waters of the United States under a dominant federal authority.[10] Although cited by the Court below, we do not find in the Court's decision in *United States* v. *Appalachian Electric Power Company*, 311 U. S. 377, 428-429, support for the statement that Congress in enacting Part I of the Federal Power Act contemplates a dual system of control within the usual meaning of that term, by the state as well as the Federal government over power projects upon navigable waters of the United States. Each has certain legitimate functions in its own sphere. But certainly it could never have been intended by Congress that a state and federal license should issue with respect to a power project upon a navigable water of the United States, and that both licenses were to have simultaneous valid application, with separate administration, and each provide for the construction, operation and maintenance of the same power project. Such must be the result if Section 9(b) gives life to Chapter 363 of the Iowa Code. Thus the ultimate in dual control would be attained. We think that the decision of this Court in the *Appalachian* case cannot be so interpreted. Dealing with the question of structures in navigable waters of the United States, the Court, at page 424, said:

> "Possessing this plenary power to exclude structures from navigable waters and domination over flowage and its product, energy, the United States may make the erection or maintenance of a structure in a navigable water dependent on a license. This power is exercised through section 9 of the Rivers and Harbors Act of 1899 prohibiting construction without Congressional consent and through section 4(e) of the present Power Act."

[10] See legislative history, Appendix, pp. 34-51, 52-60.

We think that Part I of the Federal Power Act cannot be rightly interpreted as providing any opportunity for the exercise of State regulatory powers over a hydroelectric project upon navigable waters of the United States. True, the states have jurisdiction in so far as property rights are concerned. It is equally true that Part I of the Act rightfully provides for cooperation with the states in many respects. But nowhere is there any indication that Congress intended to surrender, for state regulation and control, any part of the time honored and zealously guarded jurisdiction and authority of the federal government over commerce and navigable waters of the United States. The legislative history of Section 9(b)[11] does not justify the conclusion of the Court below that the section "saves" certain state laws as effectively as Section 27 saves other state laws. The vital question is whether Section 9(b) "saves" Chapter 363 of the Iowa Code. If it does, then Petitioner finds itself in the position of being required to secure a state permit and a federal license. Petitioner will then be in the unenviable position of not knowing how to satisfy two masters.

5. A permit from the State of Iowa either is or is not required to satisfy the provisions of Section 9(b) of the Federal Power Act. The Court below held that Petitioner, in order to satisfy the requirements of Section 9(b), must obtain a permit from the State Executive Council as provided by Chapter 363 of the Iowa Code. In concluding its opinion, the Court said:

> "The Commission, properly, insisted upon a good faith effort, by its applicant, to comply with the state law." (R. 72)

It is to be noted that the Court did not there say that a permit was required. The Court implies that the Commission must be satisfied with a "good faith effort * * * to comply with the state law."

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[11] Appendix, pp. 34-51, 52-60.

At another point in its opinion the Court makes this statement:

> "In recognizing and safeguarding the concurrent interest of the states in hydroelectric developments, it was not the purpose of Congress to require their consent to the construction and operation of such projects, or to give, to the states, a veto power over them." (R. 66)

The Court below seems to say, therefore, that a state permit is required to comply with Section 9(b) if such a permit can be had; that in any event Petitioner is required to make a *good faith effort* to obtain a permit from the Executive Council of the State of Iowa as required by Chapter 363 of the Iowa Code; and that if Petitioner fails, notwithstanding its *good faith effort* to obtain the required state permit, then Petitioner may be excused from compliance with the state law if it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Petitioner respectfully submits that Section 9(b) of the Federal Power Act cannot be construed as it has been construed by the Federal Power Commission and the Court below. The legislative history clearly indicates that in the enactment of its provisions, Congress only sought to preserve to the states those matters rightfully within the jurisdiction of the state. In the legislative history of Section 9(b), there is but one reference to a court case and that was by Congressman La Follette (56 Cong. Rec. 9810-11) who cited a decision handed down by Mr. Justice Pitney on May 12, 1917. Obviously reference was to the case of *United States* v. *Cress*, 243 U.S. 316, 319, decided on March 12, 1917. Nowhere in Part 1 of the Federal Power Act or the legislative history leading up to its passage, is there any indication that Congress intended to surrender any part of its rightful jurisdiction, power and authority over navigable waters of the United States. Yet, if it is concluded that Section 9(b) requires a state permit as a pre-

requisite to the issuance of a federal license, then Congress has surrendered a most vital part of its authority over the construction of power projects upon navigable waters of the United States and has conferred upon each of the several states broad veto powers which will enable each and every state by appropriate state legislation to determine when and under what conditions it will permit the Federal Power Commission to issue a federal license under Part I of the Federal Power Act for the construction, operation and maintenance of a power project upon navigable waters of the United States or upon any waters within the confines of a state for which a federal license is required by the provisions of Section 23(b) of the Federal Power Act.

Petitioner is impaled on the horns of a dilemma. If Petitioner obtains a state license, and, as a consequence, a federal license, it can not honestly undertake to comply with the obligations imposed by the state permit and the federal license, dealing as they do with the same subject matter and seeking simultaneously to regulate and govern construction, maintenance and operation of the project. On the other hand, even though Petitioner cannot obtain a permit from the State, it is required, according to the court below, to exhaust its administrative remedies. According to the opinion of the Attorney General of the State of Iowa, effort by Petitioner to obtain a state permit will be of no avail since the Executive Council of the State of Iowa cannot lawfully issue a state permit to Petitioner for the project in question. (R. 49) The requirement by the Court below that Petitioner make a *good faith effort* to obtain a state permit, therefore, directs Petitioner to pursue a futile course. Your Petitioner cannot believe that Congress intended that an applicant for a license under Part I of the Federal Power Act was to be thus subjected to such impossible requirements and procedures.

6. This Court in *United States* v. *West Virginia*,[12] 295 U. S. 472, held that the mere grant of a state license does not involve any infringement of the federal authority. In this case, the State of Iowa insists that it cannot under its laws grant a permit to Petitioner. The question presented, therefore, is whether a state law prohibiting the issuance of a state permit for a project for which a federal license is required, and which would be issued but for such a state law, does involve an infringement of the federal authority. The public interest and orderly administration of Part 1 of the Federal Power Act[13] requires that the issues presented be resolved by this Court.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

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November, 1945.

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[12] Although this case was discussed fully in Petitioner's reply brief filed with the Court below, the Court did not mention the case in its decision.

[13] The Federal Power Commission in its Opinion No. 110 (R. 14-17) evidences confusion as to the application and meaning of Section 9(b).

APPENDIX.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Commissioners

Claude L. Draper, Acting Chairman, John W. Scott and Clyde L. Seavey. Basil Manly and Leland Olds not participating.

June 3, 1941

Docket No. DI-154.

IN THE MATTER OF
FIRST IOWA HYDRO-ELECTRIC CO-OPERATIVE.

FINDING OF COMMISSION.

Upon declaration of intention filed January 29, 1940, pursuant to Section 23(b) of the Federal Power Act, by First Iowa Hydro-Electric Co-operative of Muscatine, Iowa, to construct a project on Cedar River, a tributary of the Iowa River, in Muscatine and Cedar Counties, Iowa; and

Upon supplemental declaration of Intention filed April 2, 1941, by the same cooperative to construct a different scheme of development at approximately the same site; and

It appearing to the Commission, after investigation of the proposed construction, consideration of the declaration of intention and supplement thereto, and all pertinent records, that:

(A) The declarant is a corporation organized and operating under the laws of the State of Iowa;

(B) The project as proposed both in the declaration of intention and supplement thereto will be located on the Cedar River near Moscow, Iowa, about 21 miles above its junction with the Iowa River, which latter stream flows into the Mississippi River at a point about 28 miles below the mouth of the Cedar River;

(C) Both the Cedar and Iowa Rivers at one time carried a portion of the produce and immigration of Central Iowa, and steamboats made many trips with more or less regularity in this trade;

(D) Past actual use of the Cedar and Iowa Rivers for navigation over a period of years and in substantial volume establishes the susceptibility of these Rivers to navigation, notwithstanding present non-use;

(E) The project as proposed in the original declaration of intention was to consist of a dam on the Cedar River not more than 53 feet high, having an over-all length of about 8,588 feet, composed of a non-overflow concrete gravity section, a concrete spillway section controlled by 16 Taintor gates, and an earth section; a power house integral with the dam, with proposed installation of three 5,000-kw. generating units; and a reservoir having a useful storage capacity of 72,000 acre-feet;

(F) The effect of operation of the project, as proposed in the original declaration of intention, would be to reduce the stage of the Iowa River at Wapello, a point about 34 miles below the project, by as much as 1.3 feet; and to reduce the stage of the Mississippi River at the mouth of the Iowa by 0.5 feet;

(G) The project as proposed in the declaration of intention as supplemented, will consist of the dam on the Cedar River; a diversion canal about 8 miles long from the reservoir on the Cedar River which will divert the water to the banks of the Mississippi River at Muscatine, Iowa; and instead of the power plant being constructed at the dam, it will be constructed on the west bank of the Mississippi River at Muscatine, and will have an initial installation of 50,000 kilowatts, with an ultimate installation of 100,000 kilowatts;

(H) The effect of operation of the project, as described in the declaration of intention as supplemented, on the flow of the Cedar and Iowa Rivers would be substantially the same as that which the original project would have caused, except that it would be more continuous and frequent;

(I) Apparently the diversion canal will be sufficient size to divert the entire flow of the Cedar River over long periods of low and moderate flow; and such diversion could lower the stage of the Iowa River by about 1.6 feet at Wapello, Iowa;

(J) The operation of the modified project would cause a discharge of additional water through the diversion canal into the Mississippi River at Muscatine in the amount of from 9,300 c.f.s. to 15,500 c.f.s. for short periods; which compares with the minimum flow in the Mississippi at Muscatine, estimated as approximately 7,300 c.f.s.;

(K) Declarant has stated that the modified project could be so operated as to give a sustained flow for six continuous days and then completely shut down for a 24-hour period over Sunday of each week, during which shut-down period a steam standby plant situated about 1½ miles from the hydro plant will be operated;

(L) According to the records of the General Land Office, two small islands situated in the Cedar River about 5½ miles and 6½ miles, respectively, above the proposed dam site and within the storage lake area of the proposed project (Lot 4, Sec. 6, and Lot 7, Sec. 8, T. 78 N., R. 2 W., 5th Principal meridian, Iowa) are vacant public lands, and are included in Power Site Classification No. 321, dated December 5, 1940;

The Commission *finds* that:

(1) The Cedar and Iowa Rivers are navigable waters of the United States;

(2) The diversion of water from the Cedar River by means of the diversion canal as set forth above would have a direct and substantial effect upon the flow and stage of the Iowa River and hence would affect the navigable capacity of that river;

(3) The alternate withholding of water in the reservoir and canal during periods of shut-down of the power plant and the release of water at substantial rates of flow during periods of operation of the power plant, as set forth above, would cause extreme fluctuations in the flow of the Mississippi River at Muscatine, Iowa, and would substantially affect the navigable capacity of that river;

(4) The interests of interstate commerce would be affected by construction of the project as described in the declaration of intention as supplemented;

(5) The two small islands described in paragraph (L) above are public lands of the United States and will be partly or wholly flooded by the reservoir of the proposed project and will be occupied by the project;

(6) A license for the construction proposed above is required under the provisions of the Federal Power Act.

By the Commission.

LEON M. FUQUAY,
Secretary.

PERTINENT SECTIONS OF THE FEDERAL POWER ACT.

SEC. 4. [*As amended August 26, 1935.*] The Commission is hereby authorized and empowered—

* * * * * * * * * * *

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation: *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of War. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further*, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall

have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920; *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

* * * * * * * * * * *

SEC. 9. That each applicant for a license hereunder shall submit to the commission—

(a) Such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project. Such maps, plans, and specifications when approved by the commission shall be made a part of the license; and thereafter no change shall be made in said maps, plans, or specifications until such changes shall have been approved and made a part of such license by the commission.

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act.

(c) Such additional information as the commission may require.

* * * * * * * * * * *

SEC. 23 (b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof,

other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

* * * * * * * * * *

SEC. 27. That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

CHAPTER 363, IOWA CODE, 1939

Mill Dams and Races.

7767 PROHIBITION—permit. No dam shall be constructed, maintained, or operated in this state in any navigable or meandered stream for any purpose, or in any other stream for manufacturing or power purposes, nor shall any water be taken from such streams for industrial purposes, unless a permit has been granted by the executive council to the person, firm, corporation, or municipality constructing, maintaining, or operating the same. (R60, §1264; C73, §1188; C97, §1921; C24, 27, 31, 35, §7767.)

7768 APPLICATION FOR PERMIT. Any person, firm, corporation, or municipality making application for a permit to construct, maintain, or operate a dam in any of the waters, including canals, raceways, and other constructions necessary or useful in connection with the development and utilization of the water or water power, shall file with the executive council a written application, which shall contain the following information:

1. The name of the navigable, meandered, or other stream in or across which a dam is maintained or it is proposed to construct a dam or other obstruction, and a description of the site for such dam, including the name or names of the riparian owners of the site.

2. The purpose for which the dam is maintained or for which it is proposed to maintain the same, including the use to which the water is to be put.

3. A general description of the dam, raceways, canals, and other constructions, including the specifications as to the material and plan of construction and a general description of all booms, piers, and other protection works which are constructed in connection therewith, or which it is proposed to erect in connection therewith.

4. The approximate amount of hydraulic power that the dam is capable of developing and the amount of power to be used.

5. A map or blue print on a scale of not less than four inches to the mile, showing the lands that are or may be affected by the construction, operation, or maintenance of the dam, and the ownership of each tract of land within the affected area.

6. Such additional information as may be required by the executive council (R60, §1265; C73, §§188, 1189; C97, §1921; C24, 27, 31, 35, §7768).

7769 Notice of Hearing. When any application for a permit to construct, maintain, or operate a dam from and after the passage of this chapter is received, the executive council shall fix a time for hearing, and it shall give notice of the time and place of such hearing by publication once each week for two successive weeks in at least one newspaper in each county in which riparian lands will be affected by the dam (R60, §§1266, 1270; C73, §1190; C97, §1922; C24, 27, 31, 35, §7769).

7770 Hearing. At the time fixed or such hearing or at any adjournment thereof, the council shall take evidence offered by the applicant and any other person, either in support of or in opposition to the proposed construction. (R60, §§1267, 1268; C73, §§1192, 1193; C97, §§1924, 1925; C24, 27, 31, 35, §7770.)

7771 When Permit Granted. If it shall appear to the council that the construction, operation, or maintenance of the dam will not materially obstruct existing navigation, or materially affect other public rights, will not endanger life or public health, and any water taken from the stream in connection with the project is returned thereto at the nearest practicable place without being materially diminished in quantity or polluted or rendered deleterious to fish life, it shall grant the permit, upon such terms and conditions as it may prescribe. (R60, §1269; C73, §§1193, 1198; C97, §1930; C24, 27, 31, 35, §7771.)

7772 Certificate of Approval. No permit shall be granted for the construction or operation of a dam where the water is to be used for manufacturing purposes, except to develop power, until a certificate of the state department of health has been filed with the council showing its approval of the use of the water for the purposes specified in the application. (C24, 27, 31, 35, §7772.)

7773 Application For Certificate. When it is proposed to use the water for maunfacturing purposes, except to develop power, or for condensation purposes, application must be made to the department of health, accompanied by a description of the proposed use of the water and what, if

any, substances are to be deposited in such water and chemical changes made in the same, and such other information as the department of health may require to enable it to determine the advisability of the issuance of such certificate. (C24, 27, 31, 35, §7773.)

7774 GRANTING OR REFUSING. If the department of health is satisfied that the use of the water in any such project will not cause pollution of the same or render it materially unwholesome or impure, or deleterious to fish life, it may issue a certificate, and if it is not so satisfied, it shall refuse to issue same. (C24, 27, 31, 35, §7774.)

7775 PERMIT FEE—annual license. Every person, firm, or corporation, excepting a municipality, to whom a permit is granted to construct or to maintain and operate a dam already constructed in or across any stream for the purpose herein specified, shall pay to the executive council a permit fee of one hundred dollars and shall pay an annual inspection and license fee, to be fixed by the executive council, on or before the first day of January, 1925, and annually thereafter, but in no case shall the annual inspection and license fee be less than twenty-five dollars. All fees shall be paid into the general fund of the state treasury.

The provisions of this section shall not apply to dams already constructed having less than twenty-five horsepower capacity. (C24, 27, 31, 35, §7775.)

7776 CONSTRUCTION AND OPERATION. The executive council shall investigate methods of construction, reconstruction, operation, maintenance, and equipment of dams, so as to determine the best methods to conserve and protect as far as possible all public and riparian rights in the waters of the state and so as to protect the life, health, and property of the general public; and the method of construction, operation, maintenance, and equipment of any and all dams in such waters shall be subject to the approval of the executive council. (C24, 27, 31, 35, §7776.)

7777 ACCESS TO WORKS. Such council or any member, agent, or employee thereof shall at all times be accorded full access to all parts of any dam and its appurtenances being constructed, operated, or maintained in such waters. (C24, 27, 31, 35, §7777.)

7778 DUTY TO ENFORCE STATUTES. It shall be the duty of the council to require that all existing statutes of the

state, including the provisions of this chapter, with reference to the construction of dams, shall be enforced. (C'24, 27, 31, 35, §7778.)

7779 Violations. The construction, maintenance, or operation of a dam for the purpose specified herein without a permit first being issued, as in this chapter provided, shall constitute a misdemeanor, and shall be punishable by a fine of not less than one hundred dollars nor more than five hundred dollars. (C'24, 27, 31, 35, §7779.)

7780 Action to Collect Fees. If any dam is constructed, operated, or maintained without the provisions of this chapter having been first complied with, including the payment of the permit fee and the annual inspection and license fee, the permit fee and the inspection and license fee may be recovered in an action brought in the name of the state, and in addition to the recovery of the amount due, there shall be collected a penalty of one thousand dollars. (C'24, 27, 31, 35, §7780.)

7781 Unlawful Combination—Receivership. If any dam for which a permit has been issued becomes owned, leased, trusteed, possessed, or controlled in such manner as to be controlled by any unlawful combination or trust, or forms the subject or part of the subject of any contract or agreement to limit the output of any hydraulic or hydroelectric power derived therefrom for the purpose of price fixing as to such output, the state may take possession thereof by receivership proceedings instituted by the council, and such proceedings shall be conducted for the purpose of disposing of said property for lawful use and the proceeds shall be turned over to the persons found by the court to be entitled thereto, after the payment of all expenses of the receivership. (C'24, 27, 31, 35, §7781.)

7782 Nuisance. If any dam is constructd, maintained or operated for any of the purposes specified herein, in waters of this state in violation of any of the provisions of this chapter or in violation of any provisions of the law, the state may, in addition to the remedies herein prescribed, have such dam abated as a nuisance. (C'24, 27, 31, 35, §7782.)

7783 Condemnation—Petition. Any person, firm, corporation, or municipality owning land on one or both sides of a watercourse, desiring to construct or heighten any dam

in such watercourse or to construct or enlarge a raceway, canal, or other construction necessary for the development or utilization of the water or water power for any of the purposes specified in this chapter therefrom for the purpose of propelling any mill or machinery or developing any power by the use of the water, and to whom a permit has been granted as in this chapter provided, may file in the office of the clerk of the district court of the county in which such dam is, or is to be erected or heightened, a petition designating himself as plaintiff and the owners of the land affected, or that will be affected, as defendants, and describing with reasonable certainty the locality where such dam is to be erected or improved, and also of the lands that will be overflowed or otherwise affected thereby. (R60, §§1264, 1265, 1274; C73, §§1188, 1189; C97, §1921; C24, 27, 31, 35, §7783.)

7784 PRECEPT FOR JURY—SERVICE. The clerk shall thereupon issue an order, with a copy of the petition attached, directed to the sheriff, commanding him to summon a jury of twelve disinterested electors of his county to meet on a day fixed therein, and upon the land described, which order, including the copy of the petition, shall be served on the defendants in the same manner and for the same length of time previous to the day fixed in the order as is required for the service of original notices. Where the owner of any land affected is a nonresident of the state, service shall be made of the notice by publication in a newspaper in the county once each week for three successive weeks. (R60, §1266; C73, §1190; C97, §1922; C24, 27, 31, 35, §7784.)

7785 GUARDIAN APPOINTED. When service is made upon a minor or insane person having no guardian, the clerk at the time of issuing the order shall, by indorsement made thereon, appoint a suitable person to make defense for him. (C73, §1190; C97, §1922; C24, 27, 31, 35, §7785.)

7786 LANDS IN DIFFERENT COUNTIES. If any of the lands are situated in a different county than that in which the petition is required to be filed, the proceedings shall apply thereto to the same extent as if such lands were situated in the county where it is filed. (R60, §1270; C73, §1191, C97, §1923; C24, 27, 31, 35, §7786.)

7787 OATH—ASSESSMENT OF DAMAGES—COSTS. The jury shall be sworn, impartially and to the best of their skill and

judgment, to view the lands described in the petition, and ascertain and appraise the damages each of the defendants will sustain by reason of such lands being overflowed or otherwise injuriously affected by the dam or raceway or heightening or enlarging the same. They may, in addition to examining the premises, examine witnesses, and shall determine the amount of damages to which each of the defendants are, in their judgment, entitled, by reason of the construction or improvement of the dam or raceway, and shall report their findings in writing, attaching the same to the order and returning it to the sheriff. All costs and fees in connection with the assessment of damages under this chapter shall be the same as in condemnation cases and shall be paid by the plaintiff. (R60, §§1267, 1273; C73, §§1192, 1193, 1203; C97, §§1924, 1925, 1935; C24, 27, 31, 35, §7787.)

7788 APPEAL. Either party may appeal from such assessment to the district court within thirty days after the assessment is made and such appeal and all further proceedings in connection with such matter, whether as to an appeal or the payment of damages and costs, and all other matters connected with the proceedings, shall be the same as provided by law for assessment of damages in taking property for works of internal improvement. (C73, §1194; C97, §1926; C24, 27, 31, 35, §7788.)

7789 PROTECTION OF BANKS. Where the water backed up by any dam belonging to any mill or machinery is about to break through or over the banks of the stream or raceway, or to wash a channel, so as to turn the water of such stream or raceway, or any part thereof, out of its ordinary channel, whereby such mill or machinery will be materially injured or affected, the owner or occupant of such mill or machinery, if he does not own such banks or the land lying contiguous thereto, may, if necessary, enter thereon and erect and keep in repair such embankments and other works as may be necessary to prevent such water from breaking through or over the banks, or washing a channel as aforesaid; such owner or occupier committing thereon no unnecessary waste or damage, and being liable to pay all damages which the owner of the lands may actually sustain by reason thereof. (R60, §§1275, 1276; C73, §1204; C97, §1936; C24, 27, 31, 35, §7789.)

7790 EMBANKMENTS—DAMAGES. If any person shall injure, destroy, or remove any such embankment or other works, the owner or occupier of such mill or machinery may recover of such person all damages he may sustain by reason thereof. (R60, §1277; C73, §1205; C97, §1937; C24, 27, 31, 35, §7790.)

7791 RIGHT TO UTILIZE FALL. Any person owning and using a water power for the purpose of propelling machinery shall have the right to acquire, maintain, and utilize the fall below such power for the purpose of improving the same, in like manner and to the same extent as provided in this chapter for the erection or heightening of mill dams. After such right has been acquired, the fall shall be considered part and parcel of said water power or privilege, and the deepening or excavating of the stream, tail, or raceway, as herein contemplated, shall in no way affect any rights relating to such water power acquired by the owner thereof prior to such change. (C73, §1206; C97, §1938; C24, 27, 31, 35, §7791.)

7792 REVOCATION OR FORFEITURE OF PERMIT. If the person to whom a permit is issued under the provisions of this chapter does not begin the construction or the improvement of the dam or raceway within one year from the date of the granting of the permit, his permit may be revoked by the executive council, and if any permit holder does not finish and have in operation the plant for which the dam is constructed within three years after the granting of the permit, unless for good cause shown the council has extended the time for completion, such permit shall be forfeited. (R60, §1269; C73, §1199; C97, §1931; C24, 27, 31, 35, §7792.)

7793 LEGISLATIVE CONTROL. No permit granted or rights acquired hereunder shall be perpetual, but they shall be subject to restriction, cancellation, and regulation by legislative action, and subject to all the provisions of this chapter. (C24, 27, 31, 35, §7793.)

7794 PENDING APPLICATIONS. All applications for a permit to construct a dam pending in the district courts of this state at the time of the passage of this chapter shall be heard and determined by the district court of the county in which same is pending under the laws of Iowa at the time of the making of the application to the district court, and

where a permit has, prior to the passage of this chapter, been granted by the district court of any county, the applicant shall, in addition to the making of the application in the form provided in section 7768, file a transcript of the proceedings of the district court granting the said permit with said application, and thereupon a permit shall be issued to the applicant without further proceedings, upon payment of the required fees. (C24, 27, 31, 35, §7794.)

7795 PERMITS FOR EXISTING DAMS. The owner of a dam existing at the time of the taking effect of this chapter shall make application for a permit, which application shall be accompanied by such proofs and data as may be required by the executive council. Upon receipt of such application with proofs and data and payment of fees as required, the executive council shall grant a permit for the maintenance and operation of said dam as a matter of course. The owner of such dam shall, however, be subject to all of the regulatory provisions of this chapter. (C24, 27, 31, 35, §7795.

7796 STATE LANDS. Whenever the erection of any such dam will affect highways or state-owned lands, the applicant shall as a condition precedent secure a permit from the board, commission, or other official body charged with jurisdiction over and control of said highways or state-owned lands. (C24, 27, 31, 35, §7796.)

7796.1 CITIES AND TOWNS. Cities and towns shall have the authority and power, by complying with the provisions of this chapter and the statutes relating to municipalities to construct dams for recreational purposes and to acquire lands that may be necessary in the construction thereof, which may be obtained by condemnation or otherwise. (C27, 31, 35, §7796-b1.)

EXCERPTS FROM MASTER'S THESIS OF ROY BAKER SNAPP SUBMITTED TO GEORGETOWN UNIVERSITY.

b. *Water Power Legislation 1917-1920*

In 1917 a bill, S. 1419, providing comprehensive legislation for the development of water power on the *navigable streams* of the United States was introduced in the Senate. This bill was the genesis of the Federal Water Power Act. The only provision in S. 1419 similar to Section 9 (b) of the Federal Water Power Act was one which provided:

> "* * * before the permit shall be granted under this act, the permittee must first obtain, in such manner as may be required by the laws of the States, the consent of the State or States in which the dam or other structure for the development of water power is proposed to be constructed."

The above provision, calling for "consent" of a State to erect a project, is a marked contrast to the ultimate wording of Section 9 (b). S. 1419 was passed by the Senate and was referred in the House to the Committee on Interstate and Foreign Commerce which had jurisdiction over navigable streams. Before the House committee could act on the proposed measure, however, President Wilson's intervention resulted in the House striking out everything but the enacting clause of S. 1419 and substituting an entirely new bill.

According to Representative Sims,[17] President Wilson early in 1918 requested the members of the House Committees on Public Lands, Agriculture, Interstate and Foreign Commerce, and Rules to confer with him at the White House. At that meeting the President stated that he had requested the Secretary of War whose department had jurisdiction over navigable rivers, the Secretary of the Interior whose department had jurisdiction over public lands, and the Secretary of Agriculture whose department had jurisdiction over forest preserves, to prepare a *single bill*[18] *which would be comprehensive enough to cover water*

[17] Cong. Rec., 65th Cong., 2nd Sess., pp. 9797-99.

[18] Introduced as H. R. 8716, 65th Cong., 2nd Sess.

power on all sites over which the federal government had jurisdiction. After summarizing the fundamental principles of the bill, the President asked the members of the committees present if they would object to having a "special committee created composed of an equal number of members of those legislative committees to consider the bill * * * and he asked the Committee on Rules * * * to advise whether or not a rule could be secured or could be formulated that would accomplish this purpose." In reply, Representative Sims indicated that his committee might be reluctant to amalgamate its power over navigable rivers with other committees and Mr. Pou of the Rules Committee said that such a committee could be established, but that the House might be reluctant to do so because such a proposition was new and might be considered as establishing a precedent.

The request of the president, was acceded to by the House, however, and on January 16, 1918 a "Special Committee on Water Power" was appointed.[19] The committee held hearings on the proposed legislation from March 18 to May 15, 1918, obtaining testimony and exhibits totaling almost 900 pages.—[20]

In theory the Special Committee on Water Power conducted hearings on S. 1419. In reality hearings were held on President Wilson's proposed substitute for that bill—H. R. 8716. The proposed substitute contained a Section 9 (b) which provided that an applicant for a license should submit to the proposed commission:

> "Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be

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[19] Thetus W. Sims, Tenn., Chr.
Scott Ferris, Okla.
Asbury F. Lever, S. C.
Frank E. Doremus, Mich.
Edward T. Taylor, Colo.
Gordon Lee, Ga.
Dan V. Stephens, Nebr.
John E. Raker, Calif.
Ezekiel S. Candler, Miss.
Carl Hayden, Ariz.
John J. Esch, Wis.
Irvine L. Lenroot, Wis.
Gilbert N. Haugen, Iowa
Edward L. Hamilton, Mich.
Wm. L. LaFollette, Wash.
James C. McLaughlin, Mich.
Richard Wayne Parker, N. J.
Sidney Anderson, Minn.

[20] Hearings Before the Committee on Water-Power, House of Rep., 65th Congress, 2nd Sess., 1918.

> located with respect to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power and in any ohter business necessary to effect the purposes of a license under this Act."

With the exception of one slight modification regarding the bed and banks of streams inserted by Representative LaFollette, this Section was ultimately to become also Section 9 (b) of the Federal Water Power Act.

The first witness called before the special committee was Mr. Merill[21] of the Department of Agriculture who, as the Chairman indicated, "assisted in the preparation of the bill."[22] After an introductory statement emphasizing the national necessity of water power legislation,[23] Mr. Merill read and explained each section of the proposed substitute for S. 1419. His statement regarding Section 9 (b) of the substitute bill was:

> "Section 9 of the bill * * * provides that (an applicant) shall present satisfactory evidence of compliance with the requirements of the laws of the State or States within which the proposed project is to be located, showing that the applicant has made application for such rights as the State required him to get before he can do business. That would cover applications for water rights, for example."[24]

Not a member of the Committee questioned Mr. Merill about the meaning of this section.

The first real illumination shed on Section 9 (b) during the testimony before the House Committee was when a Mr. Houghton of New York proposed the section should read as follows:

> "Satisfactory evidence that the applicant has obtained the consent of the duly constituted authorities

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[21] Subsequently, the first Executive Secretary of the Federal Power Commission.

[22] Hearings Before the Committee on Water Power, House of Rep., 65th Cong. 2d Sess. 1918, p. 8.

[23] *Ibid.*, p. 20.

[24] *Ibid.*, p. 62.

of the State or States within which the proposed project is to be located and has complied with the requirements of such State or States with respect to application for the right to appropriate, divert, and use water for power purposes, and for the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purpose of a license under this act."[25]

In the subsequent conversation between Representative Raker (one of the more zealous advocates of irrigation rights in the House) and Mr. Houghton, Representative Raker summarizes so succinctly the general attitude expressed by members of the Special Committee throughout the hearing and during the debate in the House, that the discourse is quoted at length.[26]

"Mr. RAKER. Referring to your suggested amendments * * * they would practically change the real fundamental principles of this bill, would they not?

"Mr. HOUGHTON. I think not. What I was trying to have inserted here was this, that before a person applies he has to show the Federal Power Commission that he has complied with the laws of the State and has received proper authority from the proper officials, and in that sense it has changed the bill, because you say that each applicant shall submit, and I say that before he makes application he shall have obtained the consent of the duly constituted authorities of the State or States.

"Mr. RAKER. Fundamentally, it resolves itself into this, that the States might pass laws subsequent to the enactment of this legislation, and if this bill provided or required that the applicants should comply with the State laws, or rules and regulations provided thereunder before he could operate under this bill, the whole scheme would be subject to the regulation and control, in effect, of the State, would it not?

"Mr. HOUGHTON. I think after he got his power he would be subject, because it provides in here—

[25] *Ibid.*, p. 364.

[26] *Ibid.*, pp. 368-370.

"Mr. RAKER (interposing). But you make this a fundamental prerequisite, that he must have complied with all the rules and regulations in regard to doing the same thing, formulated by the State authorities, before he can even come to the Federal commission and become an operator or a licensee under the provisions of this bill.

"Mr. HOUGHTON. I do not think it is quite that, Mr. Raker, because you provide here in Section 9 that each applicant shall submit to the commission certain things. It virtually follows that until he does do that the Federal Power Commission will not issue him a permit. I want to make sure that the permit will not be issued until he has complied with the requirements in the various States as they may exist at the time he makes his application.

"Mr. RAKER. That really gets back to the fact that before he can proceed to obtain the benefits of this bill, which relates to the property of the Government, he must have complied with any and all laws, rules, and regulations provided by the State through its commission and other public functionaries, and therefore before the Government of the United States can grant him a license or a commission representing the Government of the United States, he must deal with another party first.

"Mr. HOUGHTON. You said public property of the Federal Government. I have confined my remarks entirely to New York State. There are no public lands in New York State, and the only right the Federal Government has, if any, is under the commerce clause as to navigation.

"Mr. RAKER. That is quite considerable under this bill.

"Mr. HOUGHTON. It certainly is, and under the decisions it is very broad. What Congress considers as necessary for navigation is final; there is no review. Here you are seeking in the State of New York to take what the Federal Constitution grants to the citizens of New York; that is, the right to possess their own property for their purposes. It should not be taken from them without just compensation. But here you provide that anybody can go in if the Federal Govern-

ment thinks it is necessary to regulate or improve navigation and take what belongs to the people of the State. The provisions of this bill might very properly apply to developments in those States where the Federal Government has a large amount of public lands, where a great many of the navigable streams are on the public lands.

"Mr. RAKER. Then, would you not by such legislation be authorizing the Government, whenever these rights in the navigable streams give water power to the States, and allow it to legislate on that subject—would you not really make its legislation subordinate to what the State might determine, not only upon navigable streams but particularly on the nonnavigable streams and on public lands.

"Mr. HOUGHTON. It might work out that way possibly, but it seems to me there should be some protection to the State and its interest because you say navigable and nonnavigable streams. There is no telling when navigable streams will be affected by storage impounding of water on nonnavigable streams, and Congress has absolute power to regulate that.

"Mr. RAKER. That is what I am trying to get at. Congress having that power, should it waive it and make it possible by legislation that before any of this can be done, or before the licensee can get his license or the commission have the power to issue it, he must have complied with any and all regulations provided by the State?

"Mr. HOUGHTON. My suggestions were made with the view of possibly avoiding friction between the two Governments.

"Mr. RAKER. Had we not better hold to what we have and not try to waive a fundamental right that is so necessary both on the public lands on the non-navigable streams as well as on the navigable streams?

"Mr. HOUGHTON. I do not agree with you that this suggested amendment waives anything which the bill seems to give to the Federal commission. It simply changes the order of things and it does not add any additional requirements. You say the applicant has to give satisfactory evidence that he has complied with the requirements. I simply say that before he can get the permit he shall show that, so that there will be no

question about it. He might get a license and say he had made application to the State government and say he is going to meet their requirements, but he may never go through with it. This is to protect the State. I am trying to save the State.

"Mr. RAKER. You might find this case: A party or association might have complied with all the provisions of the law save the one you referred to in your amendment. The commission would be justified in their view to give him a license, but he cannot comply with the State requirements, and therefore because he is unable to comply with the State regulations, of necessity the commission cannot give him the license, and therefore you would, by your amendment, subordinate the Federal Government right to the right of the State, and the State would practically control because of a condition of that kind.

"Mr. HOUGHTON. It says you shall submit satisfactory evidence. That is mandatory. From that point of view, how are you subordinating the powers of the Federal Government, with the bill worded as I have suggested wording it, considering how it is not worded? You say he shall submit satisfactory evidence. That means he has to comply with that condition before he submits his application. I do not see the difference. I am making it stronger to see that he has complied with State laws."

The conversation terminated abruptly here when Representative Esch interposed a question.

It is evident from the foregoing that in the opinion of Representative Raker compliance with Section 9 (b) was declaratory as to policy, not a condition precedent to the issuance of a license by the proposed power commission. Obviously, Mr. Raker did not believe that the licensing power, provided for by the act, the very heart of the bill, was to be subject to the laws of the forty-eight states.

It is interesting to note, however, that instead of *satisfactory evidence* that the applicant has complied with the laws of the State or States in which the project is to be located, Mr. Houghton proposed that the applicant secure the *consent* of the duly constituted authorities of the State." S. 1419 as it passed the Senate required that "the permittee

"must first obtain * * * the *consent* of the State or States * * *" (italics supplied). In other words Mr. Houghton was asking the House Committee to return to the wording of the section as it passed the Senate. Not only did the House Committee refuse to do so, but the Senate acceded to the new wording of the Section.

Another witness, Representative Mondell testifying befor the committee and in behalf of national water power legislation said:

> "This act should contain—and I suppose there will be no opposition to that on the part of anyone, as a somewhat similar provision was contained in the Ferris House bill; as exactly the same provision is in the reclamation law, and as the principle has been generally accepted and approved—some such provision as this: 'That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water.' That is the language, if I recall it rightly, of the reclamation of law, and I think in substance the provision contained in the Ferris bill. That is simply a statement of facts. It is not a new law. It is simply recognition of the situation as a guide to administrative officers who sometimes forget very basic and fundamental things. They get views and theories that lead them far afield. Some people have suggested—I do not know whether that has been suggested before this committee—that the Supreme Court decision in the Utah case—if that is the term used in connection with that case—in some way raises the question as to the complete control by the States of the waters within their borders, particularly the arid States. I do not think there is a line or a word or a suggestion in that decision that raises any question of that sort * * *"[27]

Representative Mondell's reference to the Reclamation Act [28] and the Ferris Bill[29] was correct in that both provide "That nothing in this Act shall be construed as affecting

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[27] *Ibid.*, 620.

[28] 32 Stat. L. 388, Ch. 1093 (June 17, 1902).

[29] H. R. 16673, 63 Cong. 3rd Sess.

or intended to effect or to in any way interfere with the laws of any State. * * * relating to the control, appropriation, use, or distribution of water * * *". It must be noted, however, that this proposed language appears in Section 27 of the Federal Water Power Act, not in Section 9 (b).[30] It is noteworthy that Representative Mondell indicated that his interpretation of Supreme Court decisions was that the States under the Constitution had complete control of the non-navigable "waters within their borders", and that he referred to his proposal as a "guide to administive officers" and as a recognition of existing constitutional law.

Outside of these two discussions over Section 9 (b) of the substitute bill, none of the other witnesses before the Special Water Power Committee offered any suggestions. The only other suggestions made were minor in nature and were proposed to protect the water rights of the Western States.[31]

The Special Committee did not agree to the proposed alterations in Section 9 (b) of the substitute bill and reported the measure without modification in that section.

After S. 1419 was reported out of the Committee, Representative LaFollette made a short speech[32] in the House praising the proposal and pointing out, in particular, that it did not usurp any of the powers of the various states. Mr. LaFollette explained that.

> "This bill is brought here because it is apparent that we can get no development under a divided authority, and development is needed. * * * under the proposed law the would-be licensee is supposed to have procured all concessions and necessary powers of the State or States in which the proposed project is situated before a license can be issued, thus harmonizing State and Federal interests, making development possible without either transgressing the sovereign powers of the States or conferring on the Federal Government any plenary power not contemplated by the Constitution. Under

[30] Section 27 provides, "That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

[31] Note 22, *supra*, p. 299 and p. 474.

[32] Cong. Rec., Vol. 56, part 9, p. 9108, 65 Cong. 2d Sess.

> this bill we only allow the commission a supervisory power over those functions entirely within the State's jurisdiction for the period covered by any license, the State having exercised its rights in advance of issue."

In the same speech, Mr. LaFollette also indicated that he thought that the "legislation will prove to be sound in principle and sane in provisions as it comes from the committee, and, what is of transcendent importance, it will, with possibly one or two changes, *stand the test as to constitutionality*" (italics supplied). The "changes to which Mr. LaFollette referred were his proposal to add "bed and banks" to the list of items with which an applicant for a license would "comply". He believed that.

> "If we make it one of the conditions precedent to the procuring of a license that the applicant has complied with the requirements of the State law as to bed, banks, diversion, and use of water, we are most assuredly not infringing any State's right in that respect, but are definitely insisting that the State's rules of property as to water, bed, and banks must have been fully complied with or license can not issue."

When debate on the bill began, Representative LaFollette was the first to speak after the Clerk read Section 9 (b) of the proposed act. His earlier expression of concern as to the constitutionality of the bill was demonstrated by his proposing to amend Section 9 (b) as follows (Mr. LaFollette's proposed addition in italics):[33]

> "(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to the *bed and banks and to* the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purpose of a license under this act."

Mr. LaFollette gave the following reasons for proposing the amendment:[34]

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[33] *Ibid.*, p. 9109.

[34] *Ibid.*, p. 9110.

"Mr. Chairman, in this section, by the provision that the applicant for a license shall have complied with the rules and laws of the State in regard to the diversion of water, we are trying not to infringe the rights of the States in that respect, and I wish to call the attention of the committee to the fact that many Supreme Court decisions in respect to States' rights as to water also refer to States' rights as to the beds and banks, and I would like to read from the latest United States Supreme Court decision upon this question, delivered on May 12, 1917. The opinion was delivered by Mr. Justice Pitney, and in that he says:

> 'The States have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders, both navigable and nonnavigable, and the ownership of the lands forming their beds and banks.'

"'In many States the law gives the riparian owner title to the middle of the stream. In other States only to the high-water mark. The property rights are within the State. It can dispose of the beds, or parts of them, regardless of the riparian ownership of the banks, if it desires to, and that has been done in some States. If we put in this language, which is practically taken from that Supreme Court decision, as to the property rights of the States as to the bed and banks and to the diversion of the water, then it is sure that we have not infringed any of the rights of the States in that respect, or any of their rules of property, and we are trying in this bill above everything else to overcome a divided authority and pass a bill that will make it possible to get developments. We are earnestly trying not to infringe the rights of the States. If possible we want a bill that can not be defeated in the Supreme Court because of omissions, because of the lack of some provision that we should have put in the bill to safeguard the States."

Thus, according to Mr. LaFollette, a member of the Special Committee on Water Power, the *purpose of Section 9 (b) was to avoid infringing on the rights of the states and*

thusly to prevent questions of constitutionality from invalidating the proposed act. The amendment was acceded to by the House.

The next amendment to Section 9 (b), offered by Representative Parker of New Jersey, was to permit an applicant to provide the Commission with satisfactory evidence that he "will comply" with laws of the State, rather than that he "has complied" with such laws.[35] During the debate on the proposed amendment, Representative Mondell said that he understood Section 9 (b) merely to require "a certain applicant shall do certain things, shall comply with certain regulations and certain laws, and *all applicants can do that*" (italics supplied). This amendment failed.

The only other amendment of importance was offered by Representative Raker of California, who proposed that an applicant should provide satisfactory evidence that he had complied with the requirements of the law of the State or States in which the proposed project was to be located, "with respect to application for the right to appropriate, divert, and use."[36] Representative Raker was concerned because most state laws provide that even after an application for water rights is filed, no right can attach until an actual appropriation has been made. Such actual appropriation must by the nature of things be accompanied by substantial expenditures of funds in any case in which the appropriation is important quantitatively. Mr. Raker thought that the proposed commission might require an applicant to obtain a completed water right and he was afraid that after large expenditures an applicant might find himself refused a permit by the proposed commission.

Representative Mondell who, as noted earlier, testified in behalf of the bill, differed from Representative Rankin as to necessity and propriety of his amendment. During the debate on Representative Raker's amendment, Representative Mondell explained his interpretation of the proposed Section 9 (b) as follows (italics supplied):[37]

> "Mr. Chairman, I hope the amendment offered by the gentleman from California (Mr. Raker) will not prevail. I think the gentleman must have offered his

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[35] Cong. Rec., Vol. 56, part 10, p. 9811.

[36] Cong. Rec., Vol. 56, part 10, p. 9812.

[37] *Ibid.*

amendment under a misapprehension of the meaning and effect of the language of the provision. The gentleman is assuming that the language which he attempts to amend requires a completed water right and a water-right certificate before the party shall be granted a license under this act or his application be considered. That is not true at all. The provision is that the applicant shall have complied with the laws of the State with respect to the appropriation, diversion, or use of water; that is, he shall have complied with all of the laws of the State applicable to the situation up to the time he makes his application. As was suggested a moment ago when the amendment offered by the gentleman from New Jersey (Representative Parker) was under consideration, there are other requirements of State law that will apply after the license has been granted and construction begins, requirements that will continue on through the period of construction and through the period of operation. This provision has no refernece to such requirements. It simply requires that the State laws shall be complied with so far as the applicant can comply with them in the nature of things up to the time he makes his application. Now, from the standpoint of the commission very great harm would come if the amendment the gentleman proposes should be adopted. *There are two controlling reasons for the insertion of this paragraph. The first*, from the standpoint of water-power legislation, *is that the water-power commission shall have the benefit of all of the information which the States possess relative to the condition of water supply at the point of proposed diversion.* That is a very important reason for a provision of this kind. * * * *The second reason is so that the bill shall carry with it notice to the commission that they must proceed in accordance with the State laws, which they must do in any event, whether the provision were in the bill or not.*"

Mr. Mondell's explanations were consonant with other statements about Section 9 (b) made during the debate, *i.e.*, the section was for the guidance of the commission and that it was intended to be a restatement of the existing law on the subject.

S. 1419, as entirely rewritten was passed by the House, 231 to 23. Section 9 (b) as passed by the House was accepted by the Senate without alteration or debate.

After some modification in other sections of the bill, the Senate approved the measure and appointed a special committee composed of three members each from the Committee on Commerce and the Committee on Public Lands, to meet with House conferees on the proposed legislation. The conference reported out a compromise which passed the House but which was filibustered to death in the Senate by Senator LaFollette of Wisconsin in order to prevent passage of the pending General Deficiencies bill, which he hoped in turn would force President Wilson to call a special session in Congress and thus prevent him from attending the Peace Conference in Paris.[38]

At the very next session of Congress, S. 1419 as agreed to by the conferees, was introduced in the House as H. R. 3184, and a new special Committee on Water Power was appointed. Inasmuch as the newly constituted special Committee was practically the same as the old one and in view of the volume of hearings already produced on the subject, the new Committee reported out the bill without further hearings. Section 9 (b) was left unaltered in the new bill.

There was no debate on Section 9 (b) directly in the new session of Congress. There were two oblique references to the section made in the House, however, which might be noted. In response to a query of Representative Goodykoontz of West Virginia as to whether or not a dam could be erected on the Kanawha River in defiance of the wishes of the people below the site of the proposed dam who might be concerned for their safety in the event of a break in the dam, Representative Sinott quoted Section 9 (b).[39] Mr. Sinott also indicated that in his opinion Section 9 (b) applied before as well as subsequently to the issuance of a license.[40] There was no mention in the Senate of Section 9 (b) of the new bill.

H. R. 3184 was passed by the House and the Senate and became law when the President signed the bill June 10, 1920.

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[38] For a description of the occasion and of President Wilson sitting in the Capitol to await the outcome, see New York Times, March 5, 1919.

[39] Cong. Rec., Vol. 58, Part 3, pp. 2225-2226.

[40] *Ibid.*

c. *Summary*

Although the legislative history of the Federal Water Power Act is exasperatingly voluminous, the foregoing references to Section 9 (b) are the only ones relating directly to that provision. These references, unfortunately, are far too few and were made for the most part without a careful choice of expression. Excerpts from statements made during the hearings and the debate on Section 9(b) can be quoted either in support of the proposition that the section *is* or is *not* a limitation on the licensing power of the Federal Power Commission. There was a great deal of chattering about "compliance with state laws" in the historical development of the section, without anyone clearly defining what was intended by the phrase.

There is, however, no evidence that Congress intended Section 9 (b) to be a limitation on the licensing power of the Federal Power Commission, there is some evidence that Congress did not intend it to be a limitation, there is considerable evidence that Congress did intend it to be a guide for administrative officers, and there is considerable evidence that Congress intended it to be a restatement of existing constitutional law on the subject.

The magnifying glass approach to the legislative history is an unsatisfactory method of determining the ultimate intent of Congress in inserting Section 9 (b). True perspective of the position the Section occupies in the Federal Water Power Act is retained, however, if it be remembered that Congress was embarking on an absolutely new and untried field of federal regulation and was consequently eager to prevent the legislative innovation from being declared unconstitutional by the courts. This eagerness was, in part, responsible for the insertion of Section 9 (b).

There is, moreover, little doubt that Congress desired to avoid as much conflict as possible between the national and state governments in the administration of the Federal Water Power Act. To this end Section 9 (b) appeared a reasonable solution. Though not clearly evident from the wording of the section, the weight of the evidence revealed in the legislative history of Section 9 (b) supports the conclusion that when Congress provided that an applicant must submit "satisfactory evidence" of compliance with state laws, Congress intended for an applicant to comply only with such state laws as did not interfere with the erection of

a power project under the supervision of the Federal Power Commission. Congress contemplated that Section 9 (b) should be viewed as a legislative declaration of policy, not as a condition precedent to the granting of a license.

In administering the Federal Water Power Act, the Federal Power Commission should, in conformance with Congressional policy, insist that an applicant comply with all the laws of the state or states, within which he proposes to locate a project, which do not thwart the express will of Congress to provide for a comprehensive scheme of navigation and water power development.

Although the legislative history of Section 9 (b) supports these conclusions, it is appropriate to investigate the propriety of examining the legislative history of the Section, the interpretation given the Section by the Commission and the courts, and the constitutional questions involved, before arriving at a final conclusion.

PART XI—SUMMARY AND CONCLUSION.

The Federal Water Power Act was passed by Congress in response to a demand for comprehensive water power legislation. Congress intended that, within constitutional limits, the Federal Power Commission should implement the Congressional policy expressed in the Act. Congress also desired that the Commission should administer the Federal Water Power Act with a minimum of conflict with the laws of the various states.

In part to achieve this end, Congress inserted Section 9 (b) in the Federal Water Power Act. Section 9 (b) should be considered, however, only as a Congressional declaration of policy to harmonize Federal power activities with those of the several states, not as a condition precedent to the granting of a license by the Federal Power Commission. The Commission should, in the interests of comity, carry out this direction of Congress as long as State laws do not impede the general intent of Congress as expressed in the entire Act.

Congress further desired to point out to the courts that it had no intention of invading the police and tax powers reposing in the States under the Constitution. To this end also, Section 9 (b) was inserted in the Federal Water Power Act.

Because of the questions which arise regarding Section 9 (b), it is appropriate and necessary to study the legislative history of the Federal Water Power Act to determine the intent of Congress.

Until 1944 the Federal Power Commission administered the Federal Water Power Act in conformance with the policy expressed by Congress. The Commission has compelled applicants for a license to comply with the provisions of the laws of the various states when such compliance was constitutionally necessary. The Commission has, in addition, required compliance with the laws of the various states when such compliance did not impede the general policies expressed in the Federal Water Power Act. On January 29, 1944, however, when a situation was presented whereby compliance with state laws prevented a comprehensive scheme of water power development, the Federal Power Commission ruled that Section 9 (b) of the Federal Water Power Act was mandatory, not directory as to policy. The Commission inferentially held that Section 9(b) contemplated an abandonment by the Federal Government of the concurrent and usually exclusive jurisdiction it exercises over the streams of the nation in favor of the States, if state statutes required such an abandonment. This ruling apparently was made without recourse to the legislative history of Section 9 (b), without citation of authority, and in complete disregard of the judicial interpretation given since 1920 to the Federal Water Power Act and its various sections.

The courts have repeatedly emphasized the intention of Congress to provide for comprehensive water power development by the Federal Water Power Act and have consistently upheld a broad constitutional basis of authority for the Federal Power Commission to carry out the provisions of the Act. The courts have, furthermore, indicated by the interpretation of sections of the Federal Water Power Act similar to Section 9 (b) that such provisions recognize rights acquired under state laws, but that such rights may be extinguished by eminent domain proceedings instituted in accordance with the Act.

Considering all the factors enumerated above and elsewhere in this paper, the ultimate conclusion is that Section 9 (b) of the Federal Water Power Act requires compliance with the laws of the State or States within which an

applicant proposes to locate a project when the Federal Constitution requires such compliance, but that compliance with other state laws is a problem for administrative determination by the Federal Power Commission in the light of policy as expressed by Congress in the Federal Water Power Act.

LEGISLATIVE HISTORY OF FEDERAL POWER ACT, WITH PARTICULAR REFERENCE TO SECTIONS 9 (b) and 27*

The bills which led to the enactment of the Federal Water Power Act in 1920 may be divided into the navigable waters bills and the public lands bills.

The navigable waters bills were the Adamson Bill of 1914, H. R. 16053, 63rd Cong., 2nd Sess., the Adamson Bill of 1916, S. 3331, 64th Cong., 1st Sess., and the Shields Bill of 1917, S. 1419, 65th Cong., 2nd Sess., later amended by incorporating the provisions of H. R. 8716, 65th Cong., 2nd Sess., which changed it to the present Federal Water Power Act.

The public lands bills were the Ferris Bill of 1914, H. R. 16673, 63rd Cong., 3rd Sess., and the Ferris Bill of 1916, H. R. 408, 64th Cong., 1st Sess.

The bill which became the Federal Water Power Act was H. R. 3184, 66th Cong., 1st Sess.

Section 9 (b). The provisions of Section 9 (b) of the Federal Water Power Act for the submission of evidence with respect to the applicant's compliance with requirements of certain specified kinds of State laws are in striking contrast to the corresponding provisions which first appeared in the antecedent navigable waters bills and which made compliance with State laws in general a condition precedent to the issuance of the Federal permit.

The Adamson Bill of 1914 in Section 14 had a provision to the effect "that the Secretary of War, upon the advice and with the approval of the Chief of Engineers, may lease to any applicant *having complied with the laws of the state* in which the dam is constructed or to be constructed by the United States, the right to develop power from the surplus water over and above that required for navigation at any navigation dam now or hereafter constructed * * *." 51 Cong. Rec. 12407. [Emphasis supplied.]

The Adamson Bill of 1916, S. 3331, had a provision in Section 2 regarding compliance with state laws, reading as follows:

> As between contesting applicants for a permit hereunder having the legal qualifications required by this

* Taken from Brief of Counsel for the Federal Power Commission as filed with the Court below.

Act, and being equally well qualified to improve or develop waterways for the uses of interstate or foreign commerce, preference shall be given to that applicant which is best qualified to expedite and realize the maximum useful development of all the water resources of the region; and as between such contesting applicants which appear equally well qualified in such respect, then preference shall be given to that applicant which *has first complied with the laws of the State or States* in which the dam or diversion structure is to be constructed. [Emphasis supplied.]

The Shields bill, S. 1419, in its original form, contained provisions similar to that in the Adamson bills as to compliance with State law with the provision added to the effect that in all cases the permittee must first obtain the consent of the State or States in which the dam is to be constructed, reading as follows:

As between contesting applicants for a permit hereunder having the legal qualifications required by this Act, and being equally well qualified to comply with the conditions imposed herein, preference shall be given to that applicant which *has first acquired the right to divert the water of the stream* by means of the dam to erect which the permit is sought *and otherwise complied with the laws of the State or States* in which the dam or diversion structure is to be constructed; or if there are no State laws to be complied with the preference shall be given to the first applicant. In granting permits hereunder and fixing conditions thereof, and in prescribing rules and regulations as to the maintenance and operation of any structure to which this Act is applicable, the Secretary of War, before acting, shall have the report and advice of the Chief of Engineers: *Provided, however*, That before the permit shall be granted under this Act, the permittee must first obtain, in such manner as may be required by the laws of the States, *the consent of the State or States* in which the dam or other structure for the development of the water power is proposed to be constructed. [Italics supplied.]

The first provision[1] corresponding to Section 9 (b) to appear in the antecedent public lands bills was in the second Ferris bill of 1916, H. R. 408, which contained the following provision:

> *Provided,* That no lease shall be granted until the applicant *has complied with the requirements of the laws* of the State, States, or Territory wherein said project is to be located, providing for the appropriation of water to develop or generate the electrical energy intended to be generated by applicant's proposed project. [Italics supplied.]

The first combined navigable waters and public lands bill was H. R. 8716, introduced January 15, 1918, as the House substitute for the original Shields bill, S. 1419, and subsequently adopted in the House as an amendment to S. 1419. Section 9 (b) of the House substitute was identical with Section 9 (b) of the Federal Water Power Act as subsequently enacted, except that it did not include the words "bed and banks and" which were added by amendment in the House (56 Cong. Rec. 9810, 9811). Section 9 (b) in the House substitute, H. R. 8716, marked a distinct departure from the corresponding provisions in the antecedent bills. Not only was all language requiring State "consent" omitted, but the language with respect to compliance with State laws was changed in two respects: first, the State laws referred to were narrowly limited to those "with respect to the appropriation, diversion, and use of water for power purposes, and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act." Second, instead of making compliance with State laws a condition precedent to the issuance of the license, the Commission was authorized, in its discretion, if it should consider that the applicant had not submitted "satisfactory evidence" of compliance with State law, to refuse to proceed further administratively with consideration of the application.

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[1] This provision apparently was an outgrowth of an amendment to Section 1 of the first Ferris bill, H. R. 16673, introduced by the Senate Committee on Public Lands. See Sen. Rep. 898, 63rd Cong., 3rd Sess., pp. 1, 4, 5.

The various attempts to amend the language of Section 9 (b) as it appeared in the House substitute, H. R. 8716, and the committee reports and debates relating thereto, confirm this understanding of the Congressional purpose.

The first amendment proposed was that recommended by the Secretaries of War, Interior and Agriculture, who, in a letter dated February 17, 1918, to Honorable T. W. Sims, Chairman of the Special House Committee on Water Power, submitted their proposed amendments to H. R. 8716 (House Rep. 715, 65th Cong., 2nd Sess.) to accompany S. 1419, pp. 29-39. The Secretaries proposed to change Section 9 (b) so as to require the submission of satisfactory evidence of compliance with State laws with respect to "*application* for the right to appropriate (etc.)," instead of compliance with State laws with respect to "the *appropriation* (etc.)". This proposed amendment was not adopted by the committee and was thereafter offered on the floor of the House by Representative Raker as an amendment to Section 9 (b) (56 Cong. Rec. 9812).

> Mr. RAKER. * * * Now, let me call this to the attention of the committee: Here is an application according to the laws of my State and of the other States, where he has complied with the water laws in making his application for a right to use the water. He has absolutely no right, he has nothing in the way of an indefeasible water right, until he has completed the work and placed the water in actual use. Now, when he makes that application this provision in the law to-day is absolutely impossible to be complied with, because you require him to show that he has built the dam and constructed the ditches and put the water to an actual beneficial use before he is ever in a position to do it, when he had paid out, maybe, a million dollars or two million dollars to construct the dam and build the ditches so that he can turn the water into the head and commence to generate electricity. Now, if the man has complied with the law relating to the application for the water right, for its diversion and appropriation and use, and then gets his permit and proceeds and actually develops it according to that project, the moment he turns the water over the wheel the first time, or turns it upon the land to irrigate it, his right is complete and retroacts back to the time when he gave the

notice, and no intervening party can come along and prevent it in the meantime. But to say that he must prove a valid water right at the time of making the application, I tell you it can not be done. * * * (56 Cong. Rec. 9813.)

The viewpoint of those who opposed Congressman Raker's amendment and who ultimately prevailed is indicated by the following statements by Congressmen Mondell and Walsh:

Mr. MONDELL. The gentleman's argument is all based on the assumption that this paragraph requires the perfection of a water right. There is nothing in the paragraph that requires the perfection of a water right (56 Cong. Rec. 9813).

Mr. MONDELL. The bill provides that all provisions of the law, whatever they may be, shall have been complied with up to that time (56 Cong. Rec. 9813).

Mr. WALSH. I think if a person has filed his application for the right to appropriate water, and has complied with the laws respecting the filing of applications, it is not necessary that he should actually have appropriated the water in order for him to be said to have complied with the laws respecting the appropriation of water (56 Cong. Rec. 9813).

Mr. MONDELL. Mr. Chairman, I hope the amendment offered by the gentleman from California [Mr. Raker] will not prevail. I think the gentleman must have offered his amendment under a misapprehension of the meaning and effect of the language of the provision. The gentleman is assuming that the language which he attempt to amend requires a completed water right and a water right certificate before the party shall be granted a license under this act or his application be considered. That is not true at all. The provision is that the applicant shall have complied with the laws of the State with respect to the appropriation, diversion, or use of water; that is, he shall have complied with all of the laws of the State applicable to the situation up to the time he makes his application. As was suggested a moment ago when the amendment offered by the gentleman from New Jersey was under consideration, there are other requirements of State

law that will apply after the license has been granted and construction begins, requirements that will continue on through the period of construction and through the period of operation. This provision has no reference to such requirements. It simply requires that the State laws shall be complied with so far as the applicant can comply with them in the nature of things up to the time he makes his application. Now, from the standpoint of the Commission very great harm would come if the amendment the gentleman proposes should be adopted. There are two controlling reasons for the insertion of this paragraph. The first, from the standpoint of water-power legislation, is that the water-power commission shall have the benefit of all of the information which the States possess relative to the condition of water supply at the point of proposed diversion. That is a very important reason for a provision of this kind. Another reason—(56 Cong. Rec. 9813-9814).

Mr. MONDELL. The second reason is so that the bill shall carry with it notice to the commission that they must proceed in accordance with the State laws, which they must do in any event, whether the provision were in the bill or not (56 Cong. Rec. 9814).

As already stated, the additional words "bed and banks and" were added by an amendment in the House offered by Congressman La Follette, who explained the reason for the amendment as follows:

Mr. LA FOLLETTE. Mr. Chairman, in this section, by the provision that the applicant for a license shall have complied with the rules and laws of the State in regard to the diversion of water, we are trying not to infringe the rights of the States in that respect, and I wish to call the attention of the committee to the fact that many Supreme Court decisions in respect to States' rights as to water also refer to States' rights as to the beds and banks, and I would like to read from the latest United States Supreme Court decision upon this question, delivered on May 12, 1917. The opinion was delivered by Mr. Justice Pitney, and in that he says:

"The States have authority to establish for themselves such rules of property as they may deem expedi-

ent with respect to the streams of water within their borders, both navigable and nonnavigable, and the ownership of the lands forming their beds and banks."[2]

In many States the law gives the riparian owner title to the middle of the stream. In other States only to the high-water mark. The property rights are within the State. It can dispose of the beds, or parts of them, regardless of the riparian ownership of the banks, if it desires to, and that has been done in some States. If we put in this language, which is practically taken from that Supreme Court decision, as to the property rights of the States as to the bed and banks and to the diversion of the water, then it is sure that we have not infringed any of the rights of the States in that respect, or any of their rules of property, and we are trying in this bill above everything else to overcome a divided authority and pass a bill that will make it possible to get development (56 Cong. Rec. 9810-9811).

Thus, the limited scope of the state laws referred to in Section 9 (b) and the clear purpose of Congress not to require state consent to the hydroelectric developments to be licensed by the Commission, finds corroboration at every stage in the legislative history of the provision.

Section 27. In the case of Section 27 the outstanding fact in its legislative history is its derivation through the public lands bills from Section 8 of the Reclamation Law of 1902, c. 1093 (32 Stat. 390), U. S. C. Title 43, §383, reading as follows:

Nothing in sections 372, 373, 381, 383, 391, 392, 411, 416, 419, 421, 431, 432, 434, 439, 461, 491 and 498 of this title shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of such sections, shall proceed in conformity with such laws, and nothing in such section shall in any way affect any right of any State or of the Federal Government

[2] The language quoted by Congressman La Follette will be found in *United States* v. *Cress*, 243 U. S. 316, 319.

or of any landowner, appropriator, or user of water in, to or from any interstate stream or the waters thereof. (June 17, 1902, ch. 1093, §8, 32 Stat. 390.)

This language was reflected in Section 14 of the Ferris Bill of 1914, H. R. 16,673, which reads as follows:

> SECTION 14. That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired thereunder.

Congressman Mondell's discussion of this provision in the second Ferris Bill makes it even clearer that the provision was based upon the proprietary nature of the interests of the United States and was intended to relate particularly to the public land states of the West in which the law of prior appropriation obtained:

> Mr. MONDELL. Water Rights Under State Control. Let us not forget that the primary and essential right upon which any enterprise of this character is based in the public-land States is a right received from the people of the State and not from the Federal Government. The people of the Commonwealths of the West are the owners and proprietors of all the waters within their borders, and the only right that any individual can have or secure, at least in the majority of the public-land States, is the right to use the water at a certain designated place for a specific and useful purpose; and the right continues so long as at that place for that purpose those waters are beneficially applied. The Federal Government can give no grant of right to build power plants on public lands in the Western States that will carry with it any right to divert a drop of water or to use a drop of water for the turning of any wheel or turbine. That right, under the laws of the States, recognized by the Federal Constitution and the courts, must be secured from the people though the authorities they have provided in the States. That right in all of the States is perpetual, so long as the water shall be used at that place for that beneficial purpose (51 Cong. Rec. 13630-13631).

A broader version of the provision appeared in the Ferris Bill of 1916, H. R. 408.

> SEC. 13. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water.

This provision did not reappear in the first combined navigable waters and public lands bill, H. R. 8716, but reappeared in the narrower original form in the amended Shields Bill, S. 1419, and H. R. 3184, and was enacted as Section 27 of the Federal Water Power Act in substantially the original form. Section 27, as enacted, reads:

> That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water *used in irrigation or for municipal or other uses, or any vested right acquired therein.* [Italics supplied.]

Thus the origin and history of Section 27 confirms what a consideration of its language indicates, that the state laws therein referred to are laws governing property rights, particularly the laws of the public lands states in which the law of prior appropriations obtains.